SUPREME COURT, U. S.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN THOMAS PRICE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petitioner John Thomas Price prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit on July 8, 1971.

Opinion Below

The Second Circuit wrote an opinion affirming the petitioner's conviction but reversing the conviction of his brother William Hollis Price, another defendant, and directing a new hearing as to the defendant William Hollis Price, with respect to the constitutionality of a search and seizure of evidence, originally challenged in the U. S. District Court by both defendants.

A copy of the Second Circuit's opinion is appended hereto. The opinion is as yet unreported.

Grounds on Which Jurisdiction is Invoked

Judgment of conviction of conspiracy (Title 18, Sec. 371, U. S. Code) and interstate transportation of stolen goods (Title 18, Sec. 659) was entered against John Thomas Price in the U. S. District Court for the Western District of New York, on March 26, 1970. Judgment of conviction of the defendant William Hollis Price for criminally receiving and possessing the stolen copper wire at Milford, Pennsylvania (Title 18, Sec. 659, U. S. Code) was also entered on March 26, 1970.

On July 8, 1971, the United States Court of Appeals, Second Circuit, affirmed the conviction of the petitioner John Thomas Price, under both counts. The Court reversed and vacated the conviction of William Hollis Price, and remanded the case, as to him, to the District Court for a redetermination as to the legality of a search conducted by the Pennsylvania State Police and an F. B. I. agent of a building in New Milford, Pennsylvania, on January 11, 1967, which resulted in the discovery of two spools of copper wire, identified as being part of the shipment stolen at Buffalo on September 19, 1966.

Both defendants moved to suppress the evidence seized under the Pennsylvania search warrant as violative of their constitutional rights under the Fourth and Fifth Amendments. The District Court denied the motions of both defendants.

The jurisdiction of this Court is invoked under Title 28, United States Code, Sec. 1254.

Questions Presented for Review

1) Did the defendant John Thomas Price have standing to move to suppress the Government's evidence, seized at the warehouse at New Milford, Pennsylvania, as violative of his Fourth and Fifth Amendment rights, although he was not present at the time and place of the search and seizure?

Constitutional and Statutory Provisions Involved

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Rule 41(e). *Federal Rules of Criminal Procedure:*

"(e) *Motion for Return of Property and to Suppress Evidence.*

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the

trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Constitution of the United States, Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; * * *"

Statement of the Case

The defendants John Thomas Price and William Hollis Price are brothers. They were jointly indicted with one Frank Mirabelli under a three-count indictment.

Count 1 charged all three defendants with conspiracy, on September 19 and September 20, 1966, to steal 29,772 lbs. of magnetic copper wire which were moving in interstate commerce, and to transport the wire from Buffalo, N. Y. to New Milford, Pa.; in violation of Title 18, Sec. 371 U. S. Code.

Count 2 charged only John Thomas Price and Maribelli with the actual theft of the copper wire from interstate commerce at Buffalo on September 19, 1966; in violation of Title 18, Sec. 659, U. S. Code.

Count 3 charged only the defendant William Hollis Price with criminally receiving and possessing the stolen copper wire at New Milford, Pa. on September 20, 1966; in violation of Sec. 659.

After the jury had been selected, the defendant Mirabelli pleaded guilty to a violation of Sec. 659 as a misdemeanor. Mirabelli then testified for the Government against the Price brothers.

The jury convicted the defendant John Thomas Price under the first count, charging conspiracy, but acquitted the defendant William Hollis Price on that count.

John Thomas Price was found guilty under Count Two and William Hollis Price was found guilty under Count Three.

On January 11, 1967, under a search warrant issued by a Pennsylvania Justice of the Peace, Pennsylvania State Police and an F. B. I. agent entered a warehouse at New Milford, Pa. and there found two spools of magnetic copper wire, which were identified as having come from the stolen shipment, and which were admitted in evidence against both defendants (Government's Exhibits 11, 12, 13).

The joint motion of both defendants to suppress this evidence, was denied by the District Court. On appeal, the Second Circuit reversed this order as to the defendant William Hollis Price, but held that the defendant John Thomas Price had no standing to contest the validity of the search (Point II, Opinion).

The issue raised herein was considered and passed upon by the Second Circuit.

REASONS FOR GRANTING THE WRIT

1.

The Appellant John Thomas Price had standing to challenge the search and seizure.

The Court of Appeals held that William Hollis Price had standing to challenge the search, because the third count of the indictment charged him with possession of the stolen copper wire. However, because John Thomas Price was not charged with possession, the Court held that he had no "derivative standing to challenge the search and seizure ---".

The co-conspirator Harold Sutton testified that John Thomas Price, at Buffalo, directed him to take the stolen load to Price's grandfather's warehouse at New Milford, but forgot to give him the key to the place. When Stutton arrived at New Milford, he called John Thomas Price at Buffalo, who told Sutton to go to the home of his grandfather, George Price, to secure entry to the warehouse (Record 976-7).

Possession of the stolen copper at sometime by John Thomas Price was an essential element of both the conspiracy, as charged in the first count, and the larceny and transportation, as charged in the second count of the indictment.

Nor was bare possession the sole element of William Hollis Price's alleged illegal posession. Knowledge and criminal intent were also essential elements of that crime.

John Thomas Price was just as definitely a target of the police investigation as was his brother. If the search in fact violated constitutional rights, it violated John Thomas

Price's rights in exactly the same manner, and to the same degree, as those of his brother (*Alderman v. United States*, 394 U. S. 165, 171; *Jones v. United States*, 362 U. S. 257).

John Thomas Price needed no possessory interest in the searched premises in order to have standing. So long as "possession of the seized evidence is itself an essential element of the offense", the Government is precluded from denying John Thomas Price's requisite standing (*Simmons v. United States*, 390 U. S. 377, 390; *Jones v. United States*, *supra*).

John Thomas Price was "a person aggrieved by (the) unlawful search and seizure" to the same degree as was his brother (Federal Rule 41(e)).

Conclusion

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 3, 1971.

APPENDIX 1 — OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 500-501—September Term, 1970.

(Argued December 11, 1970 Decided July 8, 1971.)

Docket Nos. 35492-35493

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN THOMAS PRICE, WILLIAM HOLLIS PRICE,

Defendants-Appellants.

Before:

LUMBARD and FEINBERG, *Circuit Judges* and CLARIE, *District Judge.**

Appeals from judgments of conviction for conspiracy, theft of goods moving in interstate commerce, and unlawful possession of stolen goods, 18 U. S. C. § 659, in the United States District Court for the Western District of New York, Curtin, J., and a jury.

Conviction of John Thomas Price affirmed. Conviction of William Hollis Price is vacated and remanded for further proceedings.

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* Of the District of Connecticut, sitting by designation.

H. Kenneth Schroeder, Jr., United States Atttorney, Western District of New York, Buffalo, New York, for United States of America.

Charles J. McDonough, Buffalo, New York, for defendant-appellant John Thomas Price.

Thomas P. Flaherty, Buffalo, New York, for defendant-appellant, William Hollis Price.

LUMBARD, *Circuit Judge*:

This prosecution was initiated by a three-count indictment. Count I charged John Thomas Price, his brother, William Hollis Price, and Frank Mirabelli with conspiracy to steal 29,772 pounds of magnetic copper wire from Buffalo while these goods were moving in interstate commerce. Count II charged John Thomas Price and Frank Mirabelli with the substantive crime of theft, 18 U. S. C. § 659. Count III charged William Hollis Price with receipt and possession of the stolen wire. After the jury was sworn but before trial commenced, Mirabelli pleaded guilty to a lesser misdemeanor charge and testified for the government at trial. Also appearing for the government were Harold and James Sutton, who were named as co-conspirators but not as defendants. The defense rested at the conclusion of the government's case. John Thomas Price was convicted on both Counts I and II. William Hollis Price was convicted on Count III, the possession count, but the jury acquitted him on the conspiracy charge. John Thomas Price was sentenced to four years imprisonment, three years thereof suspended, and fined $15,000. William Hollis Price received a three year sentence, with two years and six months of this time suspended.

The government's proof established the following: On September 19, 1966, Frank Mirabelli, a truck driver, arrived in Buffalo with the copper wire which he had picked up in Port Newark, New Jersey, for delivery at Western Electric Company's Buffalo plant. Because he had failed to contact Western Electric in advance, Mirabelli was unable to deliver his load, and was told to return the next day. That afternoon Mirabelli, John Thomas Price and the two Suttons agreed to the theft. Pursuant to their plan, Mirabelli unhooked his tractor from the trailer load of copper and then took the tractor to a garage ostensibly for servicing. The Suttons hooked their own tractor to Mirabelli's trailer and hauled it to New Milford, Pennsylvania while Frank Mirabelli spent the night at John Thomas Price's home for an abili. One of the Suttons drove the truck while the other followed in an automobile. Upon arriving in New Milford, the Suttons were to store the copper-laden trailer in a kiln dry building, or warehouse, owned by George Price, the defendants' grandfather.

When they reached the kiln dry building, however, the Suttons discovered that John Thomas Price had forgotten to give them the keys, and they called him for instructions. Price advised them to get the keys from George Price at his home just across the state line in New York, so the Suttons drove their car to the grandfather's house. Arriving there, they met William Hollis Price, who told them that George was not at home. When the Suttons advised William that they were sent there by his brother with a "hot" load, he agreed to accompany them to New Milford and bust the lock on the kiln dry building so that the Suttons could store the goods.

During the ensuing weeks, Kenneth Baker, who leased part of George Price's premises in New Milford, and a James Davison observed copper wire being burned on the property.

On January 10, 1967, the Pennsylvania State Police and a FBI agent, acting on a tip that the grandfather had a load of copper wire stolen from North Carolina, secured a warrant from a Justice of the Peace to search the kiln dry building. No affidavits were presented to this magistrate, although the police did inform him of the nature of their information. A search that day failed to disclose any copper, but vehicles resting inside were found to have been stolen. Armed with this information, the officers secured a new search warrant, again without affidavit, and returned to the building on January 11 to remove the vehicles. While this was being done, one of the officers discovered two spools of copper wire which were identified by number as coming from the shipment Mirabelli had carried.

Since the principal claims raised by each appellant differ, it will be convenient to treat them separately. We affirm the conviction of John Thomas Price. Since we disagree with Judge Curtin's holding that William Hollis Price did not have standing to challenge the search made on January 10 and 11, we vacate his conviction and remand for further proceedings on his motion to suppress.

I.

William Hollis Price argues that the Western District of New York was improper venue for his trial on Count III relating to receipt and possession of the stolen property because his possession occurred entirely within Pennsylvania. Because we thought this presented a difficult question of law which was not adequately treated by both

parties in their main briefs, we directed the parties, by order dated February 25, 1971, to further explore the issue in supplementary briefs. The government contends that 18 U. S. C. § 659, which contains a special multi-venue provision for interstate theft, and 18 U.S.C. § 3237(a), a general multi-venue statute, clearly authorized William's trial in the Western District.[1] We find these sections more ambiguous in their applicability to the possession count than the government would have us believe. See *United States v. Bozza*, 365 F. 2d 206, 220-22 (2 Cir. 1966); *United States v. Ross*, 205 F. 2d 619 (10 Cir. 1953). See also *United States v. Johnson*, 323 U.S. 273 (1944); Abrams, Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula, 9. U.C.L.A.L. Rev. 751, 775-802 (1962).

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[1] The venue provision of 18 U. S. C. § 659 relating to theft and possession provides:

"The offense shall be deemed to have been committed not only in the district where the violation first occurred, but also in any district in which the defendant may have taken or been in possession of the said money, baggage, goods or chattels.

"The carrying or transporting of any such money, freight, express, baggage, goods, or chattels in interstate or foreign commerce, knowing the same to have been stolen, shall constitute a separate offense and subject the offender to the penalties under this section for unlawful taking, and the offense shall be deemed to have been committed in any district into which such money, freight, express, baggage, goods, or chattels shall have been removed or into which the same shall have been brought by such offender."

18 U. S. C. § 3237(a) provides:

"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

"Any offense involving the use of the mails, or transportation in interstate or foreign commerce, is a continuing offense and except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce or mail matter moves."

We need not resolve this issue, however, for we find that any valid objection to venue William Hollis Price may have was waived below. Although our precedents establish that the constitutional underpinning and importance of proper venue dictate that waiver of objections to venue should not be readily inferred, we have identified two situations where a finding of waiver is proper: (a) when the indictment or statements by the prosecutor clearly reveal this defect but the defendant fails to object; and (b) when, after the government has concluded its case, the defendant specifies grounds for acquittal but is silent as to venue. *United States v. Rivera*, 388 F. 2d 545 (2 Cir.) cert. denied, 392 U. S. 937 (1968); *United States v. Gross*, 276 F. 2d 816 (2 Cir.) cert. denied, 363 U. S. 831 (1960); *United States v. Brothman*, 191 F. 2d 70 (2 Cir. 1951).

Under either of these tests, the venue objection here asserted was waived below. At the very outset, counsel was on notice and was in fact aware that the government was proceeding on the assumption that the possession occurred in New Milford, Pennsylvania. Although Count III is silent concerning the place of possession, Count I, the conspiracy count, lists only three overt acts in which William Price's name appears, and all three specify New Milford.[2]

[2] "(7) On or about the 20th day of September, 1966, the co-conspirators Harold B. Sutton and James Sutton had a conversation with the defendant, WILLIAM HOLLIS PRICE in New Milford, Pennsylvania, relative to the storing of the magnetic copper wire.

"(8) On or about the 20th day of September, 1966, the defendant WILLIAM HOLLIS PRICE accompanied the co-conspirators and guided them to a warehouse in New Milford, Pennsylvania.

"(9) On or about the 20th day of September, 1966, the defendant, WILLIAM HOLLIS PRICE, along with co-conspirators James Sutton and Harold B. Sutton, stored the magnetic copper wire in a warehouse in New Milford, Pennsylvania."

It should be noted that item 7 was in error because the conversation occurred in New York, but the load of stolen wire was in Pennsylvania at the time.

By motion dated September 2, 1969, William Hollis Price requested a bill of particulars specifying, *inter alia*, the date when and place where he conspired illegally. The government's response was that "the indictment herein sufficiently sets forth the information requested." Aside from this explicit notice, defendant's counsel acknowledged in a preliminary hearing before Judge Curtin that he was aware of a "jurisdictional aspect" to the case because there was no "allegation of anything that relates to William Hollis Price in the Western District of New York." At that point, counsel was arguing that William may have been given immunity by a grand jury in Pennsylvania. At the conclusion of this hearing, counsel stated that he would "reserve on the jurisdictional argument that [he] might want to raise" pending further information regarding the investigation conducted by the Pennsylvania grand jury. No venue objection was raised thereafter, even though a motion for a severance was made on January 7, 1970 specifying numerous other grounds.

When the government rested its case, William moved for a directed judgment of acquittal. He argued that there was no showing of his participation in an agreement, and thus the conspiracy count must fall as a matter of law. Similarly, he contended that the proof was insufficient on the possession count, particularly because the government had failed to show that he possessed the wire on the date charged, September 20, 1966. No mention was made of venue. Following the verdict, a motion to set it aside as "contrary to law, contrary to the evidence, and contrary to the weight of the evidence" was tendered. Finally the motion was renewed at sentencing on the same grounds and also because (a) a showing of possession alone was insufficient to convict; (b) William was being convicted of

guilt by association, and (c) the testimony of co-conspirators Harold and James Sutton, as supplemented by that of Baker and Davison, was insufficient as a matter of law. Despite this specificity, no objection to venue was raised.

On the record as a whole, then, defendant's waiver of any defect in venue is manifest. Despite clear notice and actual knowledge of the presumed defect before trial commenced, William never moved to dismiss the indictment on this basis.

We do vacate the conviction of William Hollis Price, however, because we conclude that Judge Curtin erred in ruling that William lacked standing to challenge the police officers' search of the kiln dry building in January 1967. Count III, the only count on which William was convicted, charged him with possession of the copper wire stolen from interstate commerce. In *Jones v. United States*, 362 U. S. 257 (1960), the Court conferred standing to challenge a search upon a person tried of a narcotics offense whose essential element was possession. Mr. Justice Frankfurter there stated:

> "The same element in this prosecution which has caused a dilemma, *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." *Id.* at 263.

The government advances numerous arguments as to why the clear holding of *Jones* should not be applied to this case. First, the government points out that the defendant in *Jones* was legitimately on the premises at the time of the search and thus had independent standing to challenge it. William Hollis Price, on the other hand, was not

in the vicinity of the kiln dry building at the time of the search. Moreover, the search was not directed at William Price but rather George Price, the grandfather, on the belief that he was concealing a shipment of copper wire stolen from Chapel Hill, North Carolina. The difficulty with the government's position is that the holding in *Jones* that the offense of possession confers standing is clearly designated as an independent alternate holding. Moreover, the Court has subsequently recognized that the two holdings of *Jones*—that the offense of possession confers standing and that anyone legitimately on the premises at the time of the search may challenge it—are independently valid. *Simmons v. United States*, 390 U. S. 377, 390 (1968); *Mancusi v. De Forte*, 392 U. S. 364, 368 n. 5 (1968).

Second, the government contends that *Jones* is limited to situations where possession alone is sufficient to convict, whereas in the instant case the government also had to show theft, interstate commerce, and defendant's knowledge. The Third Circuit accepted this argument in a 1964 decision, *United States v. Konigsberg*, 336 F.2d 844 (3 Cir. 1964), cert. denied, 379 U. S. 933 (1964). However, in *Simmons v. United States*, 390 U. S. 377, 390 (1968), Mr. Justice Harlan for the Court interpreted *Jones* as follows:

> "When, as in *Jones*, possession of the seized evidence is itself *an essential element* of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence." (Emphasis added.)

The First, Fourth, Fifth and Seventh Circuits have followed *Simmons* in rejecting the limited reading of *Jones*. *United States v. Cobb*, 432 F.2d 716 (4 Cir. 1970); *United States v. Allsenberrie*, 424 F.2d 1209 (7 Cir. 1970); *Glisson*

v. United States, 406 F.2d 423, 427 (5 Cir. 1969); *Niro v. United States*, 388 F.2d 535 (1 Cir. 1968). See also *Kuhl v. United States*, 370 F.2d 20, 34-36 (9 Cir. 1966) *(in banc)*, where four dissenters, as the only members of that court to reach the standing issue, rejected the limited reading of *Jones*.

We agree with these later decisions in holding that, as stated in *Simmons*, there is standing where possession is "an essential element of the offense." To rule otherwise would produce results which bear no relationship to the policies underlying the Fourth Amendment and the veiw expressed in *Jones* that the government should not be allowed to take inconsistent positions, *i.e.*, that a defendant did not have possession so as to be able to challenge the search, but is guilty of possession.

The government also argues that after *Simmons*, *supra*, there is no reason to continue to apply the automatic standing rule established in *Jones*. *Simmons* held that when a defendant testifies at a suppression hearing, his testimony may not be used at trial over objection. 390 U. S. at 394. While it is true that the dilemma between self-incrimination and exercise of Fourth Amendment rights has now been removed, we must reject the government's contention, because *Simmons* explicitly reaffirmed the automatic standing rule of *Jones*. Additionally, the Court's holding that the government should not be allowed the advantage of a conviction based on inconsistent positions is untouched by the rule announced in *Simmons*. *United States v. Cobb*, 432 F.2d 716, 721-22 (4 Cir. 1970).

Finally, the government contends that unlike *Jones*, William Price was not charged with possession at the time of the search and that this distinction compels a different result. The indictment states that the offense occurred

"on or about the 20th day of September 1966," whereas the two searches were conducted on January 10 and 11, 1967. This argument gives us pause, for technically the government's position in challenging William's standing but charging him with possession is not irreconcilable, and is supported by language in *United States v. Cowan*, 396 F.2d 83 (2 Cir. 1968), and *United States v. Allsenberrie*, 424 F.2d 1209, 1213 (7 Cir. 1970). But we read *Cowan, supra*, as resting on the fact that the hotel concededly assumed valid possession of defendant's luggage pursuant to a lien provided by law, and thus Cowan forfeited his rights in the seized items, rather than upon a mere time lag between the date of the offense as charged and the date of the search. The government's purpose in offering the copper wire, which was seized in January 1967, was to support the charge of possession of that wire on September 20, 1966. We believe this is sufficient to confer standing. The alternative for which the government argues would unduly limit *Jones* to those few situations where property is seized contemporaneously with the offense but defendant for whatever reason cannot demonstrate other grounds for standing. It would also compel the defendant to admit his ownership at that later date in order to secure standing.

Since we conclude that William Hollis Price has standing to challenge the search, there remains to be considered whether the search and seizure were valid and whether the admission of the seized evidence, if error, was harmless. Although the police secured search warrants on both dates, it appears that no sworn affidavits were submitted to the issuing magistrate. Judge Curtin expressed serious reservations as to the constitutional adequacy of the procedure followed, but declined to rule on the issue since he found no standing. We think the district court should rule on

this question in the first instance. The hearing below was designed to determine standing and consequently it would seem that all the evidence relevant to the merits of the suppression motion may not have been presented and developed.

If the evidence was illegally seized, we find that the error would not be harmless. The search uncovered Mirabelli's trailer and two spools of copper wire which were definitely traced to the stolen Buffalo shipment. Without this evidence, the government has only the uncorroborated testimony of two co-conspirators, James and Harold Sutton, to establish William Price's participation in the concealment of the stolen Buffalo shipment. Although Kenneth Baker and James Davison did see William together with his grandfather, George Price, on the premises while copper was being burned, Davison admitted stealing over 800 pounds of the copper and implicated Baker in this theft. More important, there is enough in the record from which the jury could infer that George Price was a participant in other thefts, and that the copper seen by Baker and Davison came from this source rather than from the Buffalo theft. Even with the seized items in evidence, the jury clearly had difficulty in reaching its verdict. The jury commenced its deliberations at 3:50 P. M. on January 22, 1970 and the verdict was not announced until 4:30 P. M. on the following day. Moreover, the jury did acquit William Price on the conspiracy charge. In sum, while the government still has a strong case even if the seized evidence should be suppressed, we cannot say beyond a reasonable doubt that the jury could not have reached a different result. *Chapman v. California*, 386 U. S. 18 (1967); *United States ex rel. Rosenberg v. Mancusi*, slip op. 3851 (2 Cir., June 24, 1971).

To the extent that William Price joins in other arguments advanced by John Thomas Price, we find them to be without merit for the reasons stated below. Accordingly, we vacate the conviction of William Hollis Price for a determination as to the legality of the search. If the district court finds that the search was proper, a new judgment of conviction should be entered. If the search is found to have been illegal and the resulting evidence must be suppressed, a new trial should be held. The district court should make findings of fact on those issues.

II.

The arguments raised by John Thomas Price can be disposed of more briefly. We find no merit to any of them.

First John Price seeks derivative standing to challenge the search and seizure because William, or George Price, who was indicted in the Middle District of Pennsylvania, has standing. This will not do. He was not charged with possession, and the search was not directed against him. Nor has he shown any proprietary interest in the premises, and there is no indication that he was on the New Milford property at the time of the search. As held in *Alderman v. United States*, 394 U. S. 165, 171-72 (1969), a person whose rights were not violated by the search is given no special standing as a co-defendant or co-conspirator. Accord, *United States ex rel. Cardaio v. Cassacles*, slip op. 3741, at 3745 (2 Cir., June 22, 1971).

John Thomas Price next contends that the trial judge should have granted defendants' motion for a new jury after Mirabelli pleaded guilty. Mirabelli changed his plea after the jury had been sworn but before trial commenced, and then testified for the government at trial. But the plea was taken outside the presence of the jury, and thus

no error was committed. *United States v. Kelly*, 349 F.2d 720, 767-68 (2 Cir. 1965), cert. denied, 384 U. S. 947 (1966); *United States v. Crosby*, 294 F.2d 928 (2 Cir. 1961), cert. denied, 368 U. S. 984 (1962). Appellants can hardly complain that Judge Curtin should have cautioned the jury at the beginning of trial, for he asked counsel whether they wanted him to say anything and they stood mute. Both in his opening statement and charge to the jury, Judge Curtin cautioned that the testimony of accomplices should be given especially close and searching scrutiny, and that the jury should consider "any demonstrated hope of leniency or reward to be gained through testifying." See *United States v. Kelly*, *supra*, 349 F.2d at 767-68.

Defendants also argue that the trial court erred in receiving testimony concerning events, after the termination of the conspiracy. The evidence which was admitted did not concern statements made by co-conspirators after the conspiracy had ended. Instead the alleged error was allowing the police to testify regarding the fruits of their search, and receiving the testimony of Baker and Davison concerning the burning of copper wire on the New Milford property in the weeks after the theft. This evidence was properly admitted against both defendants on all counts. *United States v. Lutwak*, 344 U. S. 604, 617-18 (1953); *United States v. Bennett*, 409 F.2d 888 (2 Cir.) cert. denied, 396 U. S. 852 (1969); *United States v. Levinson*, 405 F.2d 971, 987 (6 Cir. 1968) cert. denied, 395 U. S. 906 (1969). No special instructions to the jury on this evidence were necessary, and none were requested.

The next set of objections concerns the trial judge's handling of jury requests in the course of their deliberations. First, it is claimed that Judge Curtin far exceeded the jury's request for a clarification of the theft charge against John Price in Count II. The argument is frivol-

ous. After Judge Curtin had breifly defined "theft" in one sentence, the jury indicated that it still did not understand, so he properly expanded his explanation. Appellant points to no errors in this supplemental charge, and we find none.

Second, it is argued that the court erred in refusing to re-read Mirabelli's testimony. The jury asked "to see the testimony of F. Mirabelli," but the transcript was only partially completed. Judge Curtin acknowledged that he could have read all 94 pages of testimony to the jury, but he felt this would give a lopsided view. Such determinations are committed to the sound discretion of the trial judge. *United States v. DePalma*, 414 F.2d 394 (9 Cir. 1969), cert. denied, 396 U. S. 1046 (1970); *United States v. Braxton*, 417 F.2d 878 (5 Cir. 1969); *Pinckney v. United States*, 352 F.2d 69 (5 Cir. 1965); see *United States v. Desist*, 384 F.2d 889 (2 Cir. 1967), *aff'd*, 394 U. S. 244 (1969); *cf. Tyler v. United States*, 361 F.2d 862 (10 Cir. 1966).

John Thomas Price's final contention is that the trial court erred in refusing his request to charge that the jury could convict for a misdemeanor if they found that the value of the stolen goods did not exceed one hundred dollars. The argument is frivolous. It was undisputed that the 29,772 pounds of stolen copper wire had a value of nearly $40,000. Since there was no dispute on this point, the trial judge was not required to charge on the lesser offense, nor would it have been proper to do so. *Sansone v. United States*, 380 U. S. 343, 350 (1965). He did charge the jury to acquit if they concluded that the value of the stolen goods did not exceed one hundred dollars.

The conviction of John Thomas Price is affirmed. The conviction of William Hollis Price is vacated and remanded for further proceedings in accordance with this opinion.

APPENDIX 2 — INDICTMENT

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

JOHN THOMAS PRICE, WILLIAM HOLLIS PRICE.

May 1969 Term.
No.
Vio. Title 18, U. S. C. Sections 371 and 659.

COUNT I

The Grand Jury charges:

That beginning on or about the 19th day of September, 1966, and continuing through the 20th day of September, 1966, in the Western District of New York and elsewhere, John Thomas Price, William Hollis Price and Frank Mirabelli, the defendants, and Harold B. Sutton and James Sutton, named as co-conspirators but not as defendants, wilfully, knowingly and unlawfully did combine, conspire and agree together to commit offenses against the United States, to wit, to violate Section 659, Title 18, United States Code, by embezzling, stealing, and unlawfully taking and carrying away certain goods and chattels consisting of approximately 29,772 pounds of magnetic copper wire having a value in excess of $5000.00 from Oneida Motor Freight

Company, which goods and chattels were moving in interstate commerce as a shipment of freight, with the intent to convert such goods and chattels to their own use; and to violate Section 2314, Title 18, United States Code, by transporting in interstate commerce from Buffalo, New York, to New Milford, Pennsylvania, goods, wares and merchandise consisting of approximately 29,772 pounds of magnetic copper wire having a value in excess of $5000.00, knowing the same to have been stolen; all in violation of Title 18, United States Code, Section 371.

OVERT ACTS

At the times hereinafter mentioned, the defendants committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

(1) On or about the 19th day of September, 1966, in the Western District of New York, the defendants, John Thomas Price and Frank Mirabelli, met with the co-conspirators, Harold B. Sutton and James Sutton in Buffalo, New York, and had a conversation wherein and whereby the planning of the theft of the magnetic copper freight shipment from Oneida Motor Freight Company was discussed.

(2) On or about the 19th day of September, 1966, in the Western District of New York, the defendants John Thomas Price and Frank Mirabelli had a conversation wherein they discussed unhooking the trailer load of copper wire from the tractor truck and placing the tractor truck in a service shop for servicing for purposes of covering up the defendant Frank Mirabelli's participation in the planned theft of the copper load.

(3) On or about September 19, 1966, in the Western District of New York, the defendant John Thomas Price gave a set of New York State License plates and a set of All-State Company Trucking signs to be attached to an International Tractor to Harold B. Sutton.

(4) On or about the 19th day of September, 1966, the defendant John Thomas Price drew a map for Harold B. Sutton to be used by him in locating a warehouse in New Milford, Pennsylvania.

(5) On or about the 19th day of September, 1966, Harold B. Sutton, a co-conspirator, and James Sutton, a co-conspirator, hooked up the trailer containing the magnetic copper wire to a tractor truck and hauled such load away.

(6) On or about the 20th day of September, 1966, Harold B. Sutton, a co-conspirator, transported the load of magnetic copper wire from Buffalo, New York, to New Milford, Pennsylvania.

(7) On or about the 20th day of September, 1966, the co-conspirators Harold B. Sutton and James Sutton had a conversation with the defendant William Hollis Price in New Milford, Pennsylvania, relative to the storing of the magnetic copper wire.

(8) On or about the 20th day of September, 1966, the defendant William Hollis Price accompanied the co-conspirators and guided them to a warehouse in New Milford, Pennsylvania.

(9) On or about the 20th day of September, 1966, the defendant, William Hollis Price, along with co-conspirators James Sutton and Harold B. Sutton, stored the magnetic copper wire in a warehouse in New Milford, Pennsylvania.

COUNT II

The Grand Jury further charges:

That on or about the 19th day of September, 1966, in the Western District of New York, John Thomas Price and Frank Mirabelli, unlawfully, wilfully and knowingly, and with intent to convert to their own use, did embezzle, steal, take and carry away from Oneida Transport Company, Buffalo, New York, chattels of a value in excess of $100.00, consisting of approximately 29,772 pounds of magnetic copper wire which were moving as, were a part of, and constituted an interstate shipment of freight and express from Newark, New Jersey to Western Electric Company, Buffalo, New York; all in violation of Title 18, United States Code, Section 659.

COUNT III

The Grand Jury further charges:

That on or about the 20th day of September, 1966, William Hollis Price, did knowingly receive and have in his possession chattels of a value in excess of $100.00, that is, approximately 29,772 pounds of magnetic copper wire which had been embezzled, stolen and unlawfully taken and carried away, from Oneida Freight Company in Buffalo, New York, Western District of New York, while moving in interstate commerce from Newark, New Jersey to Buffalo, New York, and the said William Hollis Price then knew the said magnetic copper wire had been stolen; all in violation of Title 18, United States Code, Section 659.

H. KENNETH SCHROEDER, JR.,
Acting United States Attorney.

A True Bill:

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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN THOMAS PRICE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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JOHN THOMAS PRICE, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with his brother William in the United States District Court for the Western District of New York, petitioner was convicted of conspiracy to steal goods moving in interstate commerce, and of theft of those goods, in violation of 18 U.S.C. 371, 659. He was sentenced to four years' imprisonment, with three years suspended, and a fine of $15,000. The court of appeals affirmed the conviction on July 8, 1971. The petition for a writ of cer-

tiorari, filed August 23, 1971, is out of time under Rule 22-2 of the Rules of this Court.

The evidence showed (Pet. App. 10) that petitioner arranged for the theft of a load of copper with the driver of the truck and that two co-defendants named Sutton were to take the stolen copper to a warehouse owned by petitioner's grandfather. Petitioner forgot to give the Suttons the key to the warehouse. William Price, petitioner's brother, accompanied the Suttons to the warehouse and broke the lock so that the goods could be stored. Petitioner's brother was convicted of receipt of stolen goods.

The sole issue which petitioner raises relates to two searches by Pennsylvania State Police and an F.B.I. agent of the warehouse of petitioner's grandfather in New Milford, Pennsylvania, pursuant to search warrants obtained by the state police from a magistrate without a written affidavit. In the course of the second search officers found copper coil from the stolen shipment. At the time of the searches neither petitioner nor William was on the premises.

Both petitioner and his brother challenged the validity of the searches at trial. The district judge denied the motions to suppress, holding that neither defendant possessed standing. The court of appeals, in a thorough opinion, held that William had standing to contest the searches, since the crime with which he was charged included possession of the seized evidence as an "essential element". See *Simmons* v. *United States*, 390 U.S. 377, 389-390; *United States* v. *Cobb*, 432 F.2d 716 (C.A. 4); *United States* v. *Allsenberrie*, 424 F.2d 1209 (C.A. 7); *Glisson* v.

United States, 406 F.2d 423, 427 (C.A. 5); *Niro* v. *United States*, 388 F.2d 535 (C.A. 1); *Kuhl* v. *United States*, 370 F.2d 20, 34-36 (C.A. 9) *(in banc)*. Accordingly it vacated William's conviction and remanded his case for determination of the validity of the searches. The court of appeals concluded, however, that petitioner lacked standing to challenge the searches, since the crimes with which he was charged (conspiracy and theft) did not include possession as an element, and petitioner could not obtain standing derivatively through his co-defendant. See *Alderman* v. *United States*, 394 U.S. 165, 171-172. This ruling was correct.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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